No. 80-5116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANE LAMAR JENKINS,
Petitioner,

vs.

LOU BREWER, Warden, Department of Corrections
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TYRONE C. FAHNER,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (312/793-3500).

Attorney for Respondent.

PATRICIA ROSEN,
Assistant Attorney General,
160 North LaSalle Street, Suite 800,
Chicago, Illinois 60601 (312/793-5635).

Of Counsel.

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NO. 80-5116

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANE LAMAR JENKINS, Petitioner, vs. LOU BREWER, Warden, Department of Corrections, Respondent.	On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether a prisoner must exhaust an effective state administrative remedies before filing an action for the deprivation of civil rights under 42 U.S.C. §1983?

STATEMENT OF THE CASE

Petitioner, Dane Lamar Jenkins, appeals from an order dismissing his complaint under 42 U.S.C. §1983. He alleged that certain property, valued at approximately $600, was taken from him without due process during a prison "shakedown." The dismissal of his complaint was affirmed because he failed to exhaust his administrative remedies.

REASONS WHY THE WRIT SHOULD BE DENIED

The Seventh Circuit correctly concluded that effective state administrative remedies should be exhausted before a prisoner filed a small property damage claim under §1983.

ARGUMENT

A state prisoner who alleges the deprivation of tangible items of personal property of no great monitary value* should be required to exhaust available, effective state administrative remedies prior to filing a claim under 42 U.S.C. §1983. Of course, exhaustion of state judicial remedies is not a prerequisite to filing a §1983 action because this section was enacted by Congress to be a remedy which is supplementary to the state court remedy. Monroe v. Pape, 365 U.S. 167, 5 L. Ed. 2d 492 (1961). However, the exhaustion of state administrative remedies can be distinguished from the exhaustion of state judicial remedies. In Secret v. Brierton, 584 F. 2d 823 (7th Cir. 1978) the Seventh Circuit stated:

> * * * One of the important purposes of §1983 was to provide a federal forum for an evenhanded enforcement of the law that was not always available in the state courts. That purpose would be frustrated if plaintiffs were forced to sue first in the state court where the resulting judgment would create collateral estoppel effects. The same problem does not arise with the exhaustion of state administrative remedies. (584 F. 2d 826).

The general rule requires that state administrative remedies be exahusted before federal review may be invoked. However, this general rule is not followed in §1983 actions for state prisoners. Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. CHI. L. REV. 537, 538 (1974). Federal prisoners, on the other hand, are required to exhaust administrative remedies in civil rights suits. See, e.g., Waddell v. Aldridge, 480 F. 2d 1078 (3d Cir. 1973).

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* Illinois law defines a "small claim" as one involving $1,000 or less, exclusive of interest and costs. (Ill. Rev. Stat., 1979, Ch. 110A, §281).

This Court has not directly addressed the issue presented by this case, although it has, in general terms held that state administrative remedies need not be exhausted prior to filing a §1983 claim. See: Houghton v. Schafer, 392 U.S. 639, 20 L. Ed. 2d 1319 (1968); Damico v. California, 389 U.S. 416, 19 L. Ed. 2d 647 (1967); Mc Neese v. Board of Education, 373 U.S. 668, 10 L. Ed. 2d 622 (1963). However, each of these holdings was arguably predicated upon the inadequacy of the state administrative procedure. See: Discussion in Secret, 584 F. 2d 826-27. Furthermore, none of the foregoing cases dealt with prisoner small claims.

In the past few years state prisoners have, with increasing frequency, turned to the federal forum in order to challenge prison regulations and conditions of their confinement. For example, in Mc Cray v. Burrell, 367 F. Supp. 1191, 1217-18 (D. Md. 1973), rev'd, 516 F. 2d 357 (4th Cir. 1975), cert dismissed as improvidently granted, 426 U.S. 471 (1976), Chief Judge Northrop noted that during the period from 1970 through April 5, 1973, the plaintiff in that case had filed a total of thirty-seven §1983 actions. The lack of an exhaustion requirement for such prisoner suits has been criticized. Comment, State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the Availability of Adequate State Remedies, 7 SETON HALL L. REV. 366 (1976).

Federal jurists have lamented the "flood" of prisoner civil rights cases (Watson v. Ault, 525 F. 2d 886, 889-90 (5th Cir. 1976)), particularly small claims by prisoners. See, Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 LAW & SOC. ORD. 557, 566,569. Some lower federal

courts have attempted to summarily dispose of prisoner small claims cases. For example, in Rhodes v. Sigler, 448 F. 2d 1237 (8th Cir. 1971), the court dismissed a §1983 claim for $2.46 stating that this section does not embrace as a civil right the deprivation of a "mere property right." (488 F. 2d 1238). Likewise, in Nickens v. White, 526 F. 2d 802 (8th Cir. 1976), the court characterized the deprivation of an office supply catalogue as "de minimis." In contrast, however, other lower federal courts have allowed the §1983 claim to proceed without exhaustion no matter how small the damage claim. See, e.g., Russell v. Bodner, 489 F. 2d 280 (3d Cir. 1973) (claimed deprivation of seven packages of cigarettes).

Exhaustion of effective administrative remedies in cases involving small property damage claims is one way in which the lower federal courts can effectively deal with the volume of prisoner small claims cases. Advantages to the exhaustion of such remedies would include: 1). the refinement and clarification of the issues presented for resolution; and 2). the state administrative fact finding process would be of great assistance to the courts, since such claims often turn on the facts. Secret, 584 F. 2d 829. Although it is conceded that exhaustion will delay the prisoner's opportunity to present his suit in the federal court, the effects of this delay are somewhat mitigated by the fact that it is likely that once administrative remedies have been exhausted the prisoner's claim could be handled more expeditiously in the federal court. See: Secret, 584 F. 2d 829.

Where a state provides an adequate, clear and effective administrative process, exhaustion of such remedies is plainly advantageous, particularly where the claim is small. Exhaustion of administrative remedies through an internal agency which is familiar with prison problems can furnish an intellegent ruling---explaining the claim and assisting the court in assesing the merits of the pro se complaint.

Finally, exhaustion of state administrative remedies in such cases would further allow federal courts to play a less intrusive role in the operation of the state prison systems. Secret, 584 F. 2d 830. Many prisoner claims would be administratively mooted, thereby obviating the need for federal intervention. In summary, therefore, it is submitted that the exhaustion of effective state administrative remedies is supported by principles of comity, federalism and judicial economy. The decision of the Seventh Circuit Court of Appeals to require exhaustion of such remedies in prisoner cases involving small property damage claims is correct, and certiorari should be denied.

C O N C L U S I O N

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

TYRONE C. FAHNER,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900
Chicago, Illinois 60601 (793-3500)

Attorney for Respondent.

PATRICIA ROSEN,
Assistant Attorney General
160 North LaSalle Street, Suite 800
Chicago, Illinois 60601 (793-5635)

Of Counsel.

A P P E N D I X

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(ARGUED MAY 28, 1980)

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

June 20, 1980.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN F. KILKENNY, Senior Circuit Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

DANE LAMAR JENKINS,
Plaintiff-Appellant,

No. 79-2437 vs.

WARDEN LOU BREWER, Department of Corrections,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 2188
Bernard M. Decker, Judge.

ORDER

Plaintiff-appellant Dane Lamar Jenkins appeals an order dismissing his complaint brought under 42 U.S.C. § 1983. Plaintiff alleged that certain property valued at approximately $600 was taken from him without due process of law during a prison "shakedown."

Having examined the record, addressed the briefs, and heard oral argument on behalf of the parties, we agree with the district court that the plaintiff failed to exhaust his administrative remedies as required by Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). Accordingly, for the reasons stated in Judge Decker's attached Memorandum Opinion and Order of October 24, 1979, which we adopt as the decision of this Court, the judgment of the district court is affirmed.

AFFIRMED.

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*The Hon. John F. Kilkenny, Senior Circuit Judge of the Ninth Circuit Court of Appeals, is sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANE LAMAR JENKINS,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	NO. 79 C 2188
	)	
LOU BREWER, Warden,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Dane Lamar Jenkins, acting pro se, has brought this action under 42 U.S.C. §1983 alleging that certain items of his personal property were taken from him in violation of the due process clause of the United States Constitution. Plaintiff is a prisoner in the Stateville Correctional Center, and his property was allegedly taken by prison officials during a "shake down" at the prison, under a declared state of emergency. Defendants have moved to dismiss for failure to state a claim upon which relief may be granted, or for summary judgment.

Defendants allege in support of their motion that the Department of Corrections should be dismissed as a defendant, that the doctrine of respondeat superior is not applicable to this case, and that plaintiff has failed to exhaust his administrative remedies as required by the Seventh Circuit in Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). In view of the result reached on this last question, it is unnecessary to decide the first two.

Plaintiff did take his complaint to the prison grievance committee, but after it was denied, he failed to utilize the available appeal to the Director of the Department of Corrections, as provided in the Department of Corrections regulations section 845(H). Plaintiff claims that exhaustion in this case would have been a futile act, citing Houghton v. Shafer, 392 U.S. 639 (1968). However, in that case, an appeal was deemed futile because the appeal would have been to the Attorney General, who had already said the prison rules had been correctly applied in that case. Id. at 640.

Secret, on the other hand, directly controls this case. Exhaustion of administrative remedies is required in "prisoner §1983 cases which allege deprivation without due process of law of tangible items of personal property of no great monetary value." 584 F.2d at 829. Administrative procedures, to be considered adequate:

> "must be capable of providing the remedy sought by the plaintiff. They must be capable of providing that remedy within a reasonable time so as not to delay unduly the plaintiff's right to file his complaint in federal court. Finally, they must not be so inherently unfair that utilization of them would be futile." Id. at 831.

In view of the facts that the appeal procedure at issue here is the very same one expressly approved by the Court of Appeals in Secret, id. at 832, and that petitioner has put forward no reasons why it should be considered "inherently unfair," this court cannot say that such an appeal would have been futile.

Plaintiff's complaint is dismissed for failure to exhaust administrative remedies.

ENTER: Bernard M. Decker
United States District Judge

DATED: October 24, 1979.

PROOF OF SERVICE

STATE OF ILLINOIS)
)ss
COUNTY OF C O O K)

MARILOU SULLIVAN, being first duly sworn, on oath deposes and states that she served the following attorney of record at the address listed below by placing three (3) copies of the Respondent's Brief in Opposition in the United States Mail, postage paid, at 160 North LaSalle Street, on October 8, 1980.

MR. DANE LAMAR JENKINS,
BOX 112
Joliet, Illinois 60434

Marilou Sullivan

SUBSCRIBED AND SWORN to
before me this 8th day
of October, 1980.

Maureen McMahon
NOTARY PUBLIC